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NO. 58878-8-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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IVAN FERENČAK,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF  
WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE  
APPEALS,

Respondents.

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**BRIEF OF RESPONDENT DEPARTMENT OF LABOR &  
INDUSTRIES**

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## I. INTRODUCTION

This is a workers' compensation case governed by Washington's Industrial Insurance Act, Title 51 RCW.<sup>1</sup> Ivan Ferencák appeals from a Superior Court judgment that affirmed the order of the Board of Industrial Insurance Appeals (Board).<sup>2</sup> The Board order affirmed, with one exception, the orders of the Department of Labor & Industries (Department) that determined Ferencák's wages for purposes of his monthly time-loss benefits. The Board found the amount of the employer-paid healthcare for Ferencák to be slightly higher than was determined by the Department, and the Department did not challenge this finding.

Ferencák now challenges the Superior Court findings and conclusions on his wage computation. He also claims that, as a person with limited English proficiency, he has a right to receive orders and correspondence from the Department in his Bosnian language and have language services provided by the Department for his unlimited, confidential communications with his attorney about his workers'

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<sup>1</sup> This case involves the issues of the existence and the scope of limited-English-proficient claimant's right to interpreter services. The same issues are being raised in the following two cases currently pending at this Court involving Bosnian-speaking workers represented by the same counsel: *Mestrovac v. Dep't of Labor & Indus.*, No. 58200-3-I; *Kustura v. Dep't of Labor & Indus.*, No. 57445-1-I (three consolidated cases). Oral argument is to be held in *Mestrovac* and *Kustura* in September 2007.

<sup>2</sup> Copies of the Superior Court judgment (CP 15-18) and the Board's Decision and Order (Certified Appeals Board Record 1-12) are attached as Appendices A and B, respectively. Ferencák appeals also from a Superior Court order that allowed the Board to intervene in this case. The Department agrees with, and does not repeat in this brief, the position taken and arguments made by the Board on this intervention issue.

compensation claim and by the Board for such communications during the breaks at, or outside, the Board hearings for the preparation of his appeal.

But Ferenčák requested that the Department send its orders and correspondence to his attorney *in English*. Further, the Board provided an interpreter for all the statements and testimony at the hearings, and he cannot complain about the lack of interpreter services at the perpetuation deposition of his economist, when his attorney chose to take the deposition for a group of claimants, none of whom (including Ferenčák) attended it.

Ferenčák received an adequate notice of the Department wage decisions, which he appealed through his attorney and vigorously contested at the Board hearing with an interpreter. Although he invokes a variety of statutes, Constitutional provisions, and public policies, his claim for further interpreter services has no support in law and should best be addressed to the Legislature. Ferenčák fails to show any reversible error in the Superior Court judgment. The Court should affirm the judgment.

## **II. COUNTERSTATEMENT OF THE ISSUES**

- A. Does substantial evidence support, and was Ferenčák not prejudiced by, the finding that the employer-paid healthcare was \$197.15 per month, when the witness upon whose testimony he relies testified to that effect, while later changing it to \$176, and the Department does not challenge the finding?**
- B. Under RCW 51.08.178(1), can Ferenčák include, as extra cash wages he was receiving at the time of injury,**

paid vacation and holidays he anticipated receiving but did not due to his injury?

- C. Does substantial evidence support the finding that Ferenčák did not receive any bonus within 12 months *before* his injury per RCW 51.08.178(3) when he produced no evidence that he did receive such a bonus?
- D. This Court held in *Erakovic* that employer taxes for various government benefit programs are not wages. Does Ferenčák explain why the taxes for unemployment insurance are distinguishable or how the Supreme Court *Granger* decision affects *Erakovic* in any way?
- E. Did the Board and Superior Court properly decline to address Ferenčák's claim for Department-level language services, as no appealed orders addressed it?
- F. In any event, did the Department violate Ferenčák's statutory, Constitutional, or other rights in sending English-written orders or not providing language services for his communications with his attorney?
- G. Did the Board violate Ferenčák's statutory, constitutional, or other rights in not providing an interpreter for his confidential communications with his attorney during hearing breaks or outside the Board?
- H. Does Ferenčák show any prejudice from his inability to receive additional language services, when he appealed the Department wage decisions with his attorney, contested them at the Board evidentiary hearing with an interpreter, but lost on the merits?
- I. Does Ferenčák show any reversible error in the IAJ's manner of conducting the hearing?
- J. Did the Department or the Board "shift" any interpreter costs to Ferenčák?

- K. Did the Superior Court properly award the Department as costs the \$200 statutory attorney fee under Chapter 4.84 RCW and the Supreme Court *Black* decision?

### III. STATEMENT OF THE CASE

#### A. Department Claim Administration

On March 20, 2002, Ferenčák injured his right leg during his work at Travis Industries (Travis) and applied for workers' compensation benefits, which the Department allowed. Findings of Fact (FF) 1, 2.<sup>3</sup>

Through his attorney, Ferenčák sent a letter to the Department, dated November 8, 2002, requesting that the Department provide "all interpreter services necessary for him to communicate with his counsel" about his claim. Certified Appeal Board Record (CABR) 91. He instructed that the Department send all orders *in English* to his attorney:

*The Department is hereby instructed to send all orders, correspondence, benefits or other communications in English to the Injured Worker's counsel at the above address until the Department receives written communication signed by the undersigned Injured Worker to address such communications to another.*

CABR 91 (emphasis added). He further requested that "all communications with him directly be made" in Bosnian or through a

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<sup>3</sup> Findings of Fact refer to those made by the Board in its Decision and Order (Certified Appeal Board Record (CABR) 1-12 – App. B) and adopted by the Superior Court in its judgment (CP 15-18 – App. A). In his Petition for Review to the Board (CABR 15-65) from an industrial appeals judge's Proposed Decision and Order (PD&O – CABR 69-82), Ferenčák did not challenge the Findings of Fact 1 and 2 in the PD&O, which are the same in substance as Findings of Fact 1 and 2 in the Decision and Order.

Bosnian interpreter. CABR 91. Beginning with the time-loss order issued on December 2, 2002, the Department sent orders and correspondence to his attorney. CABR 665, 713, 731, 741, 764, 772, 752, 780.

Ferenčák appealed to the Board a Department order that determined his wages for purposes of time-loss benefits. FF 1. The Department determined his wage for the job of injury to be \$11.50 per hour, eight hours per day, five days per week, which equals \$2,024 per month, plus \$175 monthly employer-paid healthcare – \$2,199 monthly wages. FF 1; CABR 84. He also appealed other Department orders paying or adjusting his benefits based on this wage determination. FF 1.

#### **B. The Proceedings at the Boards**

In his notices of appeal to the Board,<sup>4</sup> Ferenčák challenged the Department wage determination and asserted, invoking RCW 2.43 and due process, that he was entitled to have translation services provided by the Department or the Board for “all communications necessary in order for him to receive benefits,” including all “communications addressed to him, his lawyer, to any of his treating physicians, to any provider for the Department, including all orders, letters, deadlines, jurisdictional histories and all contents of the Board file on this appeal and on any subsequent

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<sup>4</sup> Ferenčák filed notices of appeals dated 11/11/02, 11/22/02, 12/4/02, 5/22/03, 6/3/03, 7/2/03, 7/15/03, 7/17/03, 7/29/03, and 8/12/03. CABR 86-91, 623-626, 658-661, 714-717, 732-735, 742-745, 753-756, 765-768, 773-776, 781-784.

appeal to the Superior Court . . .” CABR 86-91, 623-626, 658-661, 714-717, 732-735, 742-745, 753-756, 765-768, 773-776, 781-784. In his 11/22/02 notice of appeal, he complained that the Department sent 11/18/02 and 11/19/02 orders directly to him in English instead of sending them to his attorney. CABR 623. But, in his later notices of appeal, he still complained that the later issued orders sent to his attorney were written in English. CABR 658, 714, 732, 742, 753, 765, 773, 781.

Ferenčák requested that the Board provide him with an interpreter “for all hearings in this case and to confer with counsel on all matters in preparation for hearing,” citing Chapter 2.43 RCW and due process. CABR 114-126. An industrial appeals judge (IAJ) granted his request for the testimony at the hearings, but not for his confidential communications with his attorney or depositions. CABR 188-190.

At the hearing, Ferenčák gave his testimony and presented the testimony of Ray Corwin, Travis’s human resource manager. At the end of the hearing, Ferenčák and the Department indicated a possibility of reaching a stipulation of certain facts, and a hearing scheduled for the Department was cancelled. TR (12/5/03) 72-73.<sup>5</sup> But, as the parties were

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<sup>5</sup> This brief refers to the testimony or statements taken on the record during the Board proceedings by either “TR” or by the surname of the witness (or the maker of the statement), followed by the date of the proceeding, and the page number of the transcript in which the testimony or the statement is located. The Board transcripts are contained in the Certified Appeal Board Record.

unable to reach a stipulation, another hearing was scheduled,<sup>6</sup> TR (8/13/04) 25-26, continued twice for Ferenčák to obtain the testimony of Jerry McCadam, who took over Corwin as human resource manager after Corwin retired, TR (9/3/04) 2-4, TR (9/20/04) 1-9.

After the hearing, the IAJ issued a Proposed Decision and Order declaring the Department wage determination "affirmed," CABR 69-82, but making a finding that Travis paid \$197.15 per month for Ferenčák's medical and dental care (not \$175 per month as determined by the Department). CABR 81 (Finding of Fact 5). The IAJ also concluded that Ferenčák "was not entitled to have the Board pay the cost of an interpreter for communications between himself and his attorney regarding the processing of his claim." CABR 81 (Conclusion of Law 2).

Ferenčák petitioned the 3-member Board to review the IAJ's decision. CABR 15-65. He challenged the IAJ's wage determinations and argued that the IAJ denied him "interpreter services to prepare for hearing, to consult with counsel during breaks in the proceeding and for any other purposes related to appeal." CABR 28. He further argued that the IAJ failed to enforce subpoenas duces tecum served on Corwin and

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<sup>6</sup> Ferenčák proposed a stipulation, but it contained factual assertions and legal conclusions on his wages, his claimed right to interpreter services, and the Board's jurisdiction, to which the Department could not agree. CABR 495-505, 487; (8/13/04) at 20-24. Ferenčák proposed a revised stipulation, but it still contained facts on both wage and interpreter issues, to which the Department could not agree. CABR 389-396.

McCadam to show “his regular overtime pay and rate of pay” and “the percentage of the year end bonuses/profit sharing payments which [Ferenčák] did not receive because of his industrial injury.” CABR 23.

The Board issued a Decision and Order declaring the Department orders “affirmed,” CABR 1-12, but, like the IAJ, finding that Travis paid \$197.15 monthly healthcare for Ferenčák, FF 5 (CABR 11). The Board concluded that Ferenčák was not entitled to have the Board pay for an interpreter for his confidential communications with his attorney, CABR 11-12, and declined to address his claim for Department-level language services, stating, “No written order of the Department denying such a request, if any was made, is before the Board in these appeals,” CABR 3.

### **C. Superior Court Proceedings**

Ferenčák appealed the Board decision to King County Superior Court, which then granted the Board’s motion to intervene, CP 1-2.

After a bench trial, the Superior Court issued a memorandum opinion (CP 3-7) (attached as App. C) and a judgment (CP 15-18) (App. B), affirming the Board decision and adopting all of its findings. The court concluded that Ferenčák’s claim for Department-level language services was not before it or the Board; that he received all the interpreter services to which he was legally entitled *and more*, and that the interpreter

services the Board provided were *not required* but properly granted per WAC 263-12-097. CP 5-7. Ferencák now appeals from this judgment.

#### IV. STANDARD OF REVIEW

“RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act.” *Bennerstrom v. Dep’t of Labor & Indus.*, 120 Wn. App. 853, 857, 86 P.3d 826 (2004).

The superior court reviewing a Board decision “acts only in an appellate capacity” and “cannot consider matters outside the record or presented for the first time on appeal.” *Sepich v. Dep’t of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969); RCW 51.52.115. The “findings and decisions of the Board are prima facie correct and the burden of proof is on the party attacking them”: here, Ferencák. *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); RCW 51.52.115.

This Court reviews “the findings made after the superior court’s de novo review” to “see whether substantial evidence supports the findings” and “whether the court’s conclusions of law flow from the findings.” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The superior court’s decision “upholding the Board’s findings and decision must also be presumed correct.” *Intalco Aluminum v. Dep’t of Labor & Indus.*, 66 Wn. App. 644, 653, 833 P.2d 390 (1992) (citation omitted). Evidence is substantial if “sufficient to persuade a fair-minded,

rational person of the truth of the matter.” *R & G Probst v. Dep’t of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). “Unchallenged facts are verities on appeal.” *Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002).

Questions of subject matter jurisdiction, statutory construction, and constitutional interpretation are those of law to be reviewed de novo. *See Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002) (statutory construction, constitutional interpretation); *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999) (jurisdiction).

## V. SUMMARY OF ARGUMENT

Ferenčák raises a laundry list of arguments on the wage and interpreter issues but fails to demonstrate any reversible error in the Superior Court judgment. He argues that the wage computation should include the paid vacation and holidays and bonus he *would have received after* his industrial injury but for the injury. App Br. at 17-18. But industrial insurance compensation is based on what “the worker *was receiving* from all employment *at the time of injury*,” RCW 51.08.178(1) (emphasis added), not what the worker would have received after his injury. A bonus may be included in wage computation only if, “within the twelve months immediately preceding the injury, the worker has received

from the employer at the time of injury a bonus as a part of the contract of hire". RCW 51.08.178(3). He received no such bonus.

Ferenčák also makes the same argument rejected by this Court in *Erakovic v. Department of Labor & Industries*, 132 Wn. App. 762, 134 P.3d 234 (2006) (employer-paid taxes for various government benefit programs are not wages). He claims but fails to explain how the Supreme Court in *Granger v. Department of Labor & Industries*, 159 Wn.2d 752, 153 P.3d 839 (2007), overruled *Erakovic* when it narrowly held that the phrase "receiving . . . at the time of injury" in RCW 51.08.178(1) requires only that the benefits be "funded by the employer at the time of the injury."

On the interpreter issues, Ferenčák asserts violations of various federal and state statutes and a federal executive order, making arguments that he never raised in his petition for review at the Board (some of the arguments were also not raised at the Superior Court). He does not explain why he can claim violations of these statutes or executive order for the first time either at the Superior Court or at this Court. He cannot.

Ferenčák's claim of right to language services, to include those for his confidential communications with his attorney during the Department claim administration or the Board proceedings, is not supported by law, constitutional, statutory, or otherwise. There is "no constitutional right to counsel afforded indigents involved in worker compensation appeals." *In*

*re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995). There are 6900 plus living languages in the world.<sup>7</sup> His claim raises a matter of public policy that should best be addressed to our Legislature, not to this Court.

## VI. ARGUMENT

### A. Substantial Evidence Supports, and Ferenčák Was Not Prejudiced by, the Finding that Travis Paid \$197.15 Per Month for His Healthcare Coverage

The wage computation for time-loss benefits under RCW 51.08.178(1) includes the value of health benefits. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 821-823, 16 P.3d 583 (2001). Ferenčák asserts that *the Board* found that the employer-paid healthcare coverage for him was \$175 per month and challenges this \$175 figure by arguing *only* that McCadam testified that the coverage was \$202.84 per month. App. Br. at 17. But the Board found, which finding the Superior Court adopted, that the employer-paid healthcare coverage for Ferenčák was \$197.15 per month, a figure higher than was determined by the Department (\$175 per month), FF 5 (CABR 11), CP 17 (Finding of Fact 1.2), and the Department does not challenge this finding.

Ferenčák's argument based *solely* on McCadam's testimony must fail, because McCadam did not testify that the employer-paid healthcare

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<sup>7</sup> Raymond G. Gordon, Jr., *Ethnologue: Languages of the World* (15<sup>th</sup> ed. 2005), available at <http://www.ethnologue.com>; see also *World Almanac & Book of Facts* 731-732 (2006) (ethnologue-based compilation of languages).

coverage was \$202.84 per month<sup>8</sup> – he testified it was \$197.15 per month, McCadam (11/10/04) 26, 39-40, although he later changed the figure to \$176 (\$131.74 for medical and \$44.26 dental), explaining that \$197.15 was “the COBRA amount for the employee to pick up their insurance” for medical and dental coverage, McCadam (11/10/04) 46-48. This \$176 figure was consistent with Corwin’s testimony. Corwin (12/5/03) 39-40. Ferencák cannot complain about the higher figure. *See Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 36, 935 P.2d 684 (1997) (“We only reverse where an error is prejudicial, however.”).

**B. Anticipated Vacation Days and Holidays Lost Due to Injury Are Like Lost Future Work Days and Cannot Be Counted in Wage Computation under RCW 51.08.178(1)**

Ferencák claims that due to his injury he lost accrued vacation days and paid holidays and conclusorily argues that the dollars allegedly lost should separately be accounted for in his wage computation. App. Br. at 6, 17. It appears that he is not accurate when he states that vacation time he had accrued as of the date of injury was never paid – it appears that he received a cashout of the three accumulated vacation days.<sup>9</sup>

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<sup>8</sup> In asserting the \$202.84 figure, Ferencák points out a portion of McCadam’s testimony in which he stated that the employer-paid medical coverage was \$158.84, App. Br. at 7 (referring to the testimony of McCadam (11/10/04) 45-46), but McCadam quickly corrected his mistake and said, “I’m sorry. Employer only medical was \$131.74 that was paid,” McCadam (11/10/04) 46.

<sup>9</sup> Ferencák (12/5/03) 61-62 (Ferencák received pay after date of injury for three days of annual leave); but note also Ferencák (12/5/03) 59 (Ferencák did not get paid for accrued annual leave because he had not worked the full year needed to qualify).

RCW 51.08.178(1) determines a worker's monthly cash wage that was "received at the time of the injury" based on dollars-per-hour, hours-per-day, and days-per week. Due to his injury, Ferencák lost the opportunity to work future days as well as the opportunity to have paid leave. The formula under RCW 51.08.178(1) already takes both losses into account, and the worker can no more add to this formula dollars lost for days not worked in the future than he can add dollars for leave time not paid in the future. *In re Kay Shearer*, BIIA Dec., 96 3384 & 96 3385, 1998 WL 440532 (1998), *aff'd*, *Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 339-340, 8 P.3d 310 (2000); CABR 6 (the Board's analysis in this case).

*Shearer* does not support Ferencák. *Shearer* holds that the paid holidays and vacation a worker *received* should not be *deducted* from his or her *hours worked*, because they represent "benefits paid in lieu of work". *Shearer*, 102 Wn. App. at 340. Here, there is no claim that in computing Ferencák's wage, the Department *deducted* from *his hours worked* any of his *previously received* vacation or holidays.

### **C. Ferencák Failed to Show Any Wage-Includable Bonus**

In arguing that the Superior Court omitted his bonus from the wage computation, Ferencák claims that he was paid "a yearly profit sharing bonus in cash in December [2001] before his injury." App. Br. at 18. But his claim is not supported by any reference to the record and should not be

considered. See RAP 10.3(6); *In re Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (“strict adherence to [RAP 10.3] is not merely a technical nicety”). In any event, there is *nothing* in the record to support his claim. Ferenčák did not present any evidence as to whether he received any bonus *for the year 2001, before* his March 2002 injury.

Ferenčák appears to argue that a bonus he *anticipated* receiving at the end of the year 2002 but *did not receive* due to his injury should have been included in the wage computation and also complains that the “employer did not provide the subpoenaed records” on whether he was paid any bonus for the year 2002. App. Br. at 18. But Corwin, McCadam, and *Ferenčák himself* consistently testified that Ferenčák had not qualified for the yearly bonus for the year 2002 *at the time of his injury*, because he had not worked more than 500 eligibility-threshold hours.<sup>10</sup> Corwin (12/5/03) 32-33; Ferenčák (12/5/03) 62-63; McCadam (11/10/04) 15-18. More importantly, a “bonus” may be included as “wages” *only if*, “*within the twelve months immediately preceding the injury, the worker has received* from the employer at the time of injury a bonus as a part of the

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<sup>10</sup> McCadam explained that an employee had to work more than 500 hours to be eligible for the profit-sharing bonus and that Ferenčák had worked 440 hours, short of 500, as of his industrial injury. McCadam (11/10/04) 15-18. McCadam testified that Ferenčák, after the injury, returned to work and, as he reached 600 hours at the end of the year 2002, received the bonus distribution *then*, McCadam (11/10/04) 18-19, 36, but McCadam testified he did not know whether Ferenčák in fact received the bonus, at 38. An e-mail from Linda Foster of Travis to McCadam (admitted as Exhibit 14 *offered by Ferenčák* – (11/10/04) 15-16, 24) showed that the effective date of bonus contribution was December 31, 2002 (for allocation of the funds).

contract of hire[.]” RCW 51.08.178(3) (emphasis added). Ferencák may not include as wages a bonus he *anticipated* but did not receive within 12 months “immediately preceding” his injury. His complaint about subpoenaed documents lacks significance for the same reason – what bonus he *would have received* after his injury is irrelevant.<sup>11</sup>

**D. Under *Erakovic*, Employer-Paid Taxes for Social Security, Medicare, and Industrial and Unemployment Insurance Are Not “Wages,” and *Granger* Does Not Hold Otherwise**

This Court has recently rejected in another case the *same* argument raised by Ferencák<sup>12</sup> that employer payments for various government mandated benefit programs are “wages.” *Erakovic*, 132 Wn. App. at 772-776. Ferencák argues that *Erakovic* was “effectively overruled” by the Supreme Court decision in *Granger*, *supra*. App. Br. at 18-24.<sup>13</sup> But he offers no new argument not raised in *Erakovic* – in fact in support of his argument, Ferencák offered the *same* perpetuation testimony of Robert Moss, an economist, submitted by the claimant in *Erakovic*. Nor does he offer any persuasive analysis to show *Granger* overruled *Erakovic*.

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<sup>11</sup> Ferencák’s procedural challenge to the IAJ’s claimed failure to require subpoenaed witnesses to appear and produce evidence is addressed below in Section M.

<sup>12</sup> The attorney who represents Ferencák represented the claimants in *Erakovic*.

<sup>13</sup> In a footnote, Ferencák asserts that this Court in *Erakovic* “left open whether employment contributions to Unemployment Compensation constitute ‘wages.’” App. Br. at 19 n.30. But the only reason that this Court in *Erakovic* did not address unemployment taxes was that the claimant there had lost on that issue at superior court and had failed to appeal. *Erakovic*, 132 Wn. App. at 775. Ferencák fails to provide any argument to demonstrate why his employer’s taxes for unemployment insurance should be treated differently (for wage computation) from his employer’s taxes for Social Security, Medicare, and industrial insurance this Court held not to be wages in *Erakovic*.

In *Erakovic*, this Court held, for two independent reasons, that employers' mandatory payments for Social Security, Medicare, and industrial insurance are not wages under RCW 51.08.178(1). First, such payments are not "consideration" for work under the contract of hire, because they are "not earmarked for a specific employer's employees." *Erakovic*, 132 Wn. App. at 770. Second, they do not meet "the *Cockle* test," which requires that, at the time of injury, benefits be objectively critical to the worker's basic health and survival and provide a core necessity without which the worker could not survive even a temporary disability period. *Erakovic*, 132 Wn. App. at 770-775; *see also Cockle*, 142 Wn.2d at 821-823 (health benefits met test); *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 491-494, 120 P.3d 564 (2005) (retirement, life insurance, and certain other fringe benefits did not meet test). Like the payments for Social Security, Medicare, and industrial insurance addressed in *Erakovic*, the payments for unemployment insurance were "not earmarked for a specific employer's employees" or critical to protecting Ferencak's *basic health and survival* at the time of his injury.

*Granger* does not undermine *Erakovic* in any way. *Granger* did not involve the employer-taxes-as-wages issue raised in *Erakovic*. *Granger*, 159 Wn.2d at 757-766; *Dep't of Labor & Indus. v. Granger*, 130 Wn. App. 489, 493-497, 123 P.3d 858 (2005). *Granger* involved the

meaning of the words “receiving at the time of the injury” in RCW 51.08.178, not the language “consideration of like nature” addressed in *Erakovic*. *Granger*, 159 Wn.2d at 762. At issue in *Granger* was the time of receipt of health benefits under a banked-hours scheme. *Granger*, 159 Wn.2d at 759. There was no question that the health benefits were “consideration.” See *Granger*, 159 Wn.2d at 757-763 (recognizing the undisputed point). *Granger* does not support Ferencák’s theory that the employer payments for Social Security, Medicare, and industrial and unemployment insurance are “consideration.”

Ferencák claims that *Erakovic* “emphasized” that the claimant there was not receiving Social Security or Medicare “when injured” and failed to show the benefits were critical to her “when injured.” App. Br. at 21. He suggests that the reason *Erakovic* excluded the employer payments for various government programs from wages was that the claimant there did not receive the benefits at the time of injury. But this Court in *Erakovic* stated that, under *Granger*, the claimant there met the “receiving at the time of the injury,” but not the “consideration of like nature,” test:

*Erakovic’s benefits were being funded at the time of the injury* because her employer was making Social Security and Medicare payments at the time of the injury. But she fails to explain what the benefits of those programs are or why they are so critical to workers’ health or survival that workers would be required to replace them during even temporary periods of disability.

*Erakovic*, 132 Wn. App. at 773 (emphasis added).

There is no merit to Ferencak's claim that *Granger* overruled either the not-consideration holding or the not-of-like-nature holding of *Erakovic* as applied to employer taxes for social benefits programs.

**E. Ferencak's Claim for Department-Level Language Services Not Addressed in the Appealed Department Orders Was Neither Before the Board Nor Before the Superior Court**

Ferencak challenges the Superior Court decision not to address "the Department's use of English only to communicate on [his] claim." App. Br. at 25. He argues that he "vested the Board with jurisdiction" over the Department's "decision to send them in English only" by referring to the Department English-written orders in his notices of appeal to the Board. App. Br. at 25. He claims that the Department "knew of" his limited English proficiency and that its continued issuance of orders in English "represented [its] decision denying" his request for language services. App. Br. at 26. He is incorrect in both law and facts.

"Unlike other statutes, the Industrial Insurance Act is a self-contained scheme that provides *exclusive procedures and remedies* for injured workers." *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999) (emphasis added); *Tallerday v. DeLong*, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993) ("A worker who receives workers'

compensation benefits under the act has no separate remedy for his or her injuries except where the act specifically authorizes a cause of action.”).

The “Board’s scope of review is limited to those issues which the Department previously decided.” *Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994). The superior court reviewing a Board decision “cannot consider matters outside the record or presented for the first time on appeal.” *Sepich*, 75 Wn.2d at 316; *see also Brakus v. Dep’t of Labor & Indus.*, 48 Wn.2d 218, 219-223, 292 P.2d 865 (1956) (the Board lacks power to “change the issues brought before it by a notice of appeal and enlarge the scope of the proceedings”); RCW 51.52.115.

Ferenčák may appeal any decision by the Department about its administration of his claim to the Board, if he was aggrieved by the decision, whether it is in the form of a letter or order. RCW 51.52.050, .060, .070. But he must first obtain *a decision* by the Department *on the matter* he was aggrieved by. The mere fact the Department sent him wage determination and time-loss payment or adjustment orders in English does not mean the Department made *a decision to deny his language service request*. In fact, Ferenčák sent a letter to the Department, dated November 8, 2002 (*before* he filed his notices of appeal), specifically instructing the Department to send orders and correspondence to his attorney *in English*,

CABR 91, which the Department did, beginning with the time-loss order of December 2, 2002, CABR 665, 713, 731, 741, 764, 772, 752, 780.

As no Department orders on appeal manifested any decision to deny Ferencák language services, the Board and the Superior Court properly declined to review, as not properly before them, his claim for Department-level services. Ferencák could have filed a writ of mandamus to compel the Department to act, but he did not. *See Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 352, 358, n.13, 88 P.3d 432 (2004) (“If Cena was as frustrated with the process as counsel claims, *and could not procure a decision from L&I*, Cena could have filed a writ of mandamus pursuant to RCW 7.16.160 in superior court to compel agency action.”).

#### **F. Ferencák Fails to Show a Violation of Chapter 2.43 RCW**

Ferencák argues that the Department and the Board violated his rights under Chapter 2.43 RCW. App. Br. at 31-33. But the statute does not *require* the Department or the Board to provide interpreter services.

The statute does not create a right to an interpreter, *see* RCW 2.43.010, but requires that an interpreter *when appointed* in a “legal proceeding” be “qualified,” RCW 2.43.030(1). It allocates interpreter costs to “the governmental body initiating the legal proceeding,” RCW 2.43.040(2), or, in “other legal proceedings,” to “the non-English-speaking person, unless such person is indigent,” RCW 2.43.040(3). This

distinction is consistent with the due process law that distinguishes “government-initiated proceedings seeking to affect adversely a person’s status” such as “criminal prosecution, deportation or exclusion” and “hearings arising from the person’s affirmative application for a benefit”. *Abdullah v. INS*, 184 F.3d 158, 165 (2<sup>nd</sup> Cir. 1999) (due process does not require an interpreter for special agricultural worker status applicants during INS interviews); *see also State v. Nemitz*, 105 Wn. App. 205, 211, 19 P.3d 480 (2001) (“The purpose of the interpreter statute is to provide interpreters for *defendants, witnesses, and others compelled to appear.*”).

The statute does not apply to the Department claim administration, because it is not a “legal proceeding.” A “legal proceeding” is “a proceeding in any court in this state, grand jury hearing, *or hearing* before an inquiry judge, or *before an* administrative board, commission, *agency*, or licensing body of the state or any political subdivision thereof.” RCW 2.43.020(3) (emphasis added). The claim administration is not a “hearing” and is irrelevant to a worker’s appeal to the Board. *See, e.g., McDonald v. Dep’t of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001) (“However, the processes L&I employed in reaching its ultimate decision denying the application to reopen are irrelevant.”). The “hearing” begins *after* the Department makes a decision in an *ex parte*, non-adversarial manner, and an aggrieved party appeals it to the Board,

which then conducts a de novo *hearing* to determine whether the decision is correct. RCW 51.52.050–.104; *McDonald*, 104 Wn. App. at 623.<sup>14</sup>

The Board proceeding is a “legal proceeding,” but the Board is not required to provide an interpreter at its expense, because it did not “initiate” the proceeding. RCW 2.43.040(2). It was *Ferenčak* who “initiated” the proceeding by filing a notice of appeal. RCW 51.52.050, .060. Although *not required*, the Board, per its own rule, provided him with an interpreter for all the testimony and statements at the hearings he attended. See WAC 263-12-097 (“When . . . a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in a hearing before the [Board], the [IAJ] *may* appoint an interpreter to assist the party or witness throughout the proceeding.”). As he admits, this rule “allows, but does not require, free interpreter services”. App. Br. at 27.

**G. Ferenčak’s Claims of Violation under RCW 51.52.050, Washington’s Law Against Discrimination, Title VI, and Presidential Executive Order Lack Merit**

Ferenčak claims that the English-written Department orders failed to “communicate” his rights under RCW 51.52.050, App. Br. at 28-29,

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<sup>14</sup> Ferenčak appears to argue that Chapter 2.43 RCW applies to Department claim administration because “[t]here is no other legislative authorization found in Washington statute for purchasing interpreter services.” App. Br. at 32. He overlooks the implied power the Legislature has vested in the Department to carry out its programs. See generally *Tuerk v. Dep’t of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (implied authority explained); see also RCW 43.22.030; 51.04.010; -.030(1); 51.32.095(1); -.114; 51.36.010(1)

and that the Department and the Board discriminated against him for his national origin in violation of Washington's Law Against Discrimination (WLAD) and Title VI of the Civil Rights Act, App. Br. at 30-31, 34-36, and violated Presidential Executive Order (EO) 13166 (2000 WL 34508183), App. Br. at 33-34. But he never raised his claims of violation under RCW 51.52.050 and WLAD at the Superior Court, CP 19-32, 208-425, or at the Board in his petition for review, CABR 15-65. He may not raise these arguments for the first time at this Court. *See* RAP 2.5(a). Further, he never raised his Title VI or EO 13166 arguments at the Board in his petition for review. CABR 15-65. These claims were thus not properly before the Superior Court or this Court. *Sepich*, 75 Wn.2d at 316. In any event, his arguments on all of these claims lack merit.

As to his claim of violation of RCW 51.52.050, the language he relies on requires only that the Department *include* in its order a "statement" about how to appeal the order and the appeal deadline – that the order will become final within 60 days "from the date the order is communicated to the parties," unless appealed during this time frame. RCW 51.52.050. Nothing in the statute requires the Department to "communicate" its order to the claimant *in his or her primary language*. Further, the Supreme Court has rejected the argument that the word "communicated" denotes "some actual understanding on the part of the

workman of the nature of the order.” *Rodriguez v. Dep’t of Labor & Indus.*, 85 Wn.2d 949, 951, 540 P.2d 1359 (1975). The word “communicated” requires “only that a copy of the order be received by the workman.” *Rodriguez*, 85 Wn.2d at 952-953.

As to EO 13166 (directing federal grant agencies to develop LEP guidelines), it expressly and unambiguously states it does *not* create any enforceable “right or benefit, substantive or procedural”:

This order is intended only to improve the internal management of the executive branch and *does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.*

EO 13166 § 5 (emphasis added). This language demonstrates Presidential intent specifically to reject the type of argument raised by Ferenčák here.

As to WLAD and Title VI, Ferenčák does not explain how a workers’ compensation claimant may raise a discrimination claim under these state and federal statutes in his appeal from a Board decision under the Industrial Insurance Act. *See* RCW 49.60.030(2) (“Any person deeming himself . . . injured by any act in violation of this chapter shall have *a civil action* in a court of competent jurisdiction.”); *Sepich*, 75 Wn.2d at 316 (the superior court “has no original jurisdiction” in workers’ compensation cases); *Brand*, 139 Wn.2d at 668 (the Industrial Insurance Act “provides exclusive procedures and remedies for injured workers”).

Nor does Ferenčák provide adequate analysis under WLAD or Title VI to demonstrate an actionable discrimination. See *Alexander v. Sandoval*, 532 U.S. 275, 280-293, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (Section 602 of Title VI creates a privately enforceable right against “intentional discrimination,” but not “disparate impact”). This Court should thus reject his arguments as not supported by any authority or analysis. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“[T]he three grounds argued are not supported by any reference to the record nor by any citation of authority; we do not consider them.”); *State v. Thomas*, 150 Wn.2d 821, 868-869, 83 P.3d 970 (2004) (“[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.”).

Ferenčák attaches a Department provider bulletin PB 05-04 (not in the Board record) and argues that it “recognizes that the failure to provide adequate interpreter services in medical care constitutes discrimination based on national origin and violates Title VI.” App. Br. at 34. But the provider bulletin is “advisory only” and “does not implement or enforce the law”. *Wash. Educ. Ass’n v. Pub. Disclosure Comm’n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003). Also, PB 05-04 does not describe a Department interpretation but describes a federal agency’s Title VI disparate impact analysis, which, as stated above, is not privately enforceable. Further,

Ferenčák's case does not address the health care interpreter services addressed in PB 05-04, which the Department indisputably provides.

Ferenčák refers to a consent decree apparently entered in an unrelated case, involving the Department of Social and Health Services (DSHS). App. Br. at 35. But consent decrees are not enforceable by or against anyone but the parties to the decrees. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 2184, 104 L. Ed. 2d 835 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."). The Department of Labor and Industries was not a party to the consent decree and is not bound by it. Further, the fact the DSHS or another state agency provides services *per their regulations* does not mean that the Department of Labor and Industries has a legal duty to do so.<sup>15</sup>

#### **H. Ferenčák Fails to Explain How the Department or the Board Violated a Public Policy under RCW 2.43.010**

Citing RCW 2.43.010, Ferenčák claims that the Department and the Board violated the public policy expressed in the statute. App. Br. at 30. But the stated policy is "to secure the rights, constitutional or otherwise" of limited-English-proficient persons. RCW 2.43.010.

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<sup>15</sup> The record is inadequate to assess the level of interpreter services actually provided by DSHS or any other state agency.

Because he fails to show any violation by the Department or the Board of any of his “rights, Constitutional or otherwise,” his argument lacks merit.

**I. Ferenčák Failed to Show a Due Process Violation<sup>16</sup>**

Ferenčák argues that the Department and the Board violated his procedural due process rights. App. Br. at 36-38. “Due process requires notice and an opportunity to be heard.” *State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783 (1997). The Department orders of wage determination and time-loss payment or adjustment in English and the Board’s evidentiary hearing with an interpreter satisfied due process.

**1. The Department English Notice Satisfied Due Process**

Ferenčák argues that the Department orders sent to him and his attorney violated his due process rights, saying, “Sending English only orders to LEP workers does not constitute notice”. App. Br. at 36. Due process requires notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The Department orders satisfied such notice.

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<sup>16</sup> The Department will not engage in separate analysis of Washington and federal due process clauses, because Ferenčák does not make such analysis or suggest that a greater protection is provided under Washington’s with an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The courts in other jurisdiction have determined that, in civil cases involving only economic interests as here, due process does not require government agencies to provide notices or services to persons with limited English proficiency *in their primary language*. See *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (unemployment benefit denial); *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994) (administrative seizure); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983) (social security disability benefits denial), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984); *Alfonso v. Bd. of Review*, 444 A.2d 1075, 1076-1078 (N.J. 1982) (“[I]n an English-speaking country, requirements of ‘reasonable notice’ are satisfied when the notice is given in English.”); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909-10 (Mass. 1975) (condemnation); *Hernandez v. Dep’t of Labor*, 416 N.E.2d 263, 266-67 (Ill. 1981) (unemployment benefit denial); *Guerrero v. Carleson*, 512 P.2d 833, 837 (Cal. 1973) (“[P]rior governmental preparation of that notice in Spanish is not a constitutional imperative under the due process clause.”); see also *Frontera v. Sindell*, 522 F.2d 1215, 1221 (6th Cir. 1975) (no due process right to civil service exam in Spanish).

The Department orders were initially sent to Ferenčák, then to his attorney per his request, all of which contained his name, claim number, and injury date, the Department’s name and address, and the phone

number of the claims manager. CABR 84-85, 662-665, 698, 713, 731, 741, 764, 772, 752, 780. Such notices should alert a reasonable limited-English-proficiency claimant to seek language assistance, if necessary, as Ferenčák apparently did. See *Guerrero*, 512 P.2d at 836 (“[T]he government may reasonably assume that the non-English speaking individual will act promptly to obtain [language] assistance when he receives the notice in question.”); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999) (“It has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required.”).

Ferenčák’s reliance on *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), is misplaced. *Hull* did not involve a due process issue. It involved the constitutionality, under the First Amendment and the federal equal protection clause, of Arizona’s constitutional amendment that “*explicitly and broadly prohibit[ed]* government employees *from using non-English languages*,” thus prohibiting the “use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English.” *Hull*, 957 P.2d at 996 (emphasis added). The *Hull* Court held that the amendment impermissibly restricted speech of public employees and others and was not narrowly

tailored to meet its goal to promote English as a common language, because “English can be promoted *without prohibiting the use of other languages* by state and local governments.” *Hull*, 957 P.2d at 1001 (emphasis added). *Hull* pointed out, and turned in significant part on, the “critical difference between encouraging the use of English and repressing the use of other languages.” *Hull*, 957 P.2d at 991.

Unlike the constitutional amendment in *Hull*, the Department’s English notices or services do not *prohibit* the use of any other languages. Arizona’s broad ban on public employees’ use of other languages in *Hull* must be distinguished from Ferencák’s claim of an “*affirmative* right to *compel* state government to provide information in a language that [he] can comprehend.” *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995) (en banc) (emphasis added), *vacated as moot*, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997).<sup>17</sup>

The *Hull* Court recognized that it is “not [the Court’s] prerogative to impinge upon the *Legislature’s ability to require*, under appropriate circumstances, the provision of services in languages other than English.” *Hull*, 957 P.2d at 997 (emphasis added). In other words, the decisions as to whether, when, and in what languages to provide language services

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<sup>17</sup> Although the Supreme Court has vacated the Ninth Circuit opinion in *Arizonans for Official English* on *mootness* grounds, the *Hull* Court explicitly relied on the opinion, stating, “On the merits of the case, however, we agree with the result and with much of the reasoning of the Ninth Circuit opinion.” *Hull*, 957 P.2d at 987 n.1.

should be "best left to those branches of government that can better assess the changing needs and demands of both the non-English speaking population and the government agencies that provide the translation." *Alfonso*, 444 A.2d at 1977; *see also Olivo*, 337 N.E.2d at 910 n.6; *Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 121 (S.D.N.Y. 1991).

**2. Ferencák Had an Adequate Opportunity to Contest the Wage Decision at the Board Evidentiary Hearing with an Interpreter**

Ferencák had an adequate opportunity to contest the Department wage determination at the Board evidentiary hearing with an interpreter.

Due process "has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error." *Mackey v. Montrym*, 443 U.S. 1, 13, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979). The court will determine the specific dictates of due process in a particular case by balancing (1) the private interest affected, (2) the risk of an erroneous deprivation of that interest through the procedures used and the value of additional safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens the additional safeguards would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

As to the first *Mathews* factor, although Ferencák has a protected interest in his *claim* for more benefits than was awarded to him, such an interest, no matter how important, is not as great as, and must be distinguished from, a *vested* right to benefits involved in *Mathews*. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (workers' interests in "their *claims* for payment" are "fundamentally different" from a *vested* right to benefits); *Lander v. Indus. Comm'n of Utah*, 894 P.2d 552, 555 (Utah Ct. App. 1995) (worker's interest in his claim for benefits "falls short of a vested right to benefits as in *Mathews*"); *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 475, 843 P.2d 1056 (1993) ("Where the Department has neither considered nor determined whether a worker is permanently and totally disabled, that worker has a *future expectation of benefits, not a vested right*."). Also, his interest must be assessed in light of the fact he will be awarded full retroactive relief if he ultimately prevails. See *Mathews*, 424 U.S. at 340 (relevant to the first factor analysis was the fact the disability recipient whose benefits were terminated would be awarded full retroactive relief if he ultimately prevailed<sup>18</sup>). This is not a case where the

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<sup>18</sup> Also, the benefits at stake in *Mathews* and here are not the last safety net for the worker. See *Mathews*, 424 U.S. at 342 ("[T]he disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the

State “will not be able to make [a driver whose license was suspended] whole” through a post-suspension process. *Mackey*, 443 U.S. at 11.<sup>19</sup>

As to the second factor, the risk of an erroneous decision on the contested wage issue due to the lack of additional interpreter services is minimal. For example, California’s Supreme Court has rejected a civil, non-English-speaking, indigent, and represented defendant’s due process challenge to the trial court’s denial of an interpreter for attorney-client communications, stating that, as the court proceedings were “controlled by counsel,” the defendant was “in no worse position than the numerous represented litigants who elect not to be present in court at all.” *Jara v. Municipal Court*, 578 P.2d 94, 96-97 (Cal. 1978).

Ferenčák was represented by his attorney from the outset of the Board proceedings, and, unlike the defendant in *Jara*, was provided with an interpreter for all the testimony and statements made on the record throughout the hearings, except for the perpetuation deposition of his economist, which he did not attend, and which addressed theoretical economic concepts. He had a right (which he exercised) to seek judicial

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termination of disability benefits places a worker or his family below the subsistence level.”).

<sup>19</sup> While recognizing this fact, the Supreme Court in *Mackey* nonetheless concluded that due process does not require a prior evidentiary hearing for suspending a driver’s license under Massachusetts’ implied consent law. *Mackey*, 443 U.S. at 11-19.

review of the Board decision. He does not explain how additional interpreter services would have changed the outcome of this case.

As to the third factor, cost is a significant factor when it comes out of a state benefit program with finite funds:

*At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.*

*Mathews*, 424 U.S. at 348 (emphasis added). Given the nature of Ferencák's claim and the reliable procedural safeguards used (the evidentiary hearing with an interpreter), *the value of having additional interpreter services requested* is simply outweighed by the cost.

Ferencák claims that "saving the state money" does not justify "withholding benefits," citing *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 57 P.2d 611 (2002). App. Br. at 38. *Willoughby* involved the constitutionality of a statute that denied disbursement of permanent partial disability benefits to prisoners who had no statutory beneficiaries and were unlikely to be released from prison, although the prisoners were otherwise eligible for the benefits. *Willoughby*, 147 Wn.2d at 728-730. Unlike the statute in *Willoughby*,

which *denied* the prisoners of the benefits to which they were otherwise entitled *simply because of their prisoner-without-beneficiary status*, the Department here did *not*, just to save money, deny Ferencák any benefits to which he was otherwise entitled, just because he speaks Bosnian.

For his claim for Department-level language services, Ferencák relies on the statement in *Buffelen Woodworking v. Cook*, 28 Wn. App. 501, 625 P.2d 703 (1981), that a workers' compensation claimant has a protected interest in potential benefits. App. Br. at 37. But, as stated above, the Department notice of its wage determination and the Board evidentiary hearing satisfied due process. *See Mathews*, 424 U.S. at 332-349 (even for termination of disability benefits, due process does *not* require *pre-deprivation* hearing).

**J. Ferencák Fails to Show Prejudice Resulting from His Inability to Obtain Additional Language Services**

To prove a due process violation, Ferencák must show actual prejudice. *See Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) ("To make out a violation of due process as the result of an inadequate translation, Gutierrez must demonstrate that a better translation likely would have made a difference in the outcome."); *Kufo v. Ashcroft*, 391 F.3d 856, 859 (7th Cir. 2004) ("A generalized claim of inaccurate translation, without a particularized showing of prejudice based on the

record, is insufficient to sustain a due process claim.”); *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997) (due process violation requires actual prejudice); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (same).

Ferenčák fails to prove prejudice, as he fails to show that the lack of additional services has *affected the outcome in this case*. See *Gutierrez-Chavez*, 298 F.3d at 830 (prejudice must be shown in the outcome).

#### **K. Ferenčák Fails to Show an Equal Protection Violation<sup>20</sup>**

Ferenčák argues that the Department and the Board violated his equal protection rights. App. Br. at 40. He is incorrect.

Equal protection requires, within reason, “that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *Seattle Sch. Dist. No. 1 v. Dep’t of Labor & Indus.*, 116 Wn.2d 352, 362, 804 P.2d 621 (1991). It “does not require identical treatment of people who are in fact different.” *Seattle Sch. Dist.*, 116 Wn.2d at 364. “The standard of review in a case that does not employ suspect classification or fundamental right is rational basis, also called

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<sup>20</sup> The Department does not engage in separate equal protection analysis under Washington and federal Constitutions, because Ferenčák does not make such separate analysis or suggest that a greater protection is provided under Washington’s with an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). In the equal protection area, an independent state constitutional analysis “applies only where the challenged legislation grants a privilege or immunity to a minority class, that is, in the case of a grant of positive favoritism.” *Andersen v. King County*, 158 Wn.2d 1, 14, 138 P.3d 963 (2006) (plurality).

minimal scrutiny.” *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004) (citation omitted).

Here, the rational basis review applies, because Ferenčák fails to show any suspect classification or fundamental right. Workers’ benefits are “finite resources,” not a fundamental right. *Willoughby*, 147 Wn.2d at 739; *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995) (“Where as here, the interest at stake is only a financial one, the right which is threatened is not considered ‘fundamental’ in a constitutional sense.”). “Language, by itself, does not identify members of a suspect class.” *Soberal-Perez*, 717 F.2d at 41; *Olivo*, 337 N.E.2d at 911 (“The class burdened, however, is not those of Spanish descent, but those unable to read English. This is not a suspect class.”); *Valdez*, 783 F. Supp. at 122 (housing authority’s “failure to provide its documents to plaintiff in Spanish does not implicate a protected class”); *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1137-38 (E.D. Cal. 2004) (“[N]o case has held that the provision of services in the English language amounts to discrimination against non-English speakers based on ethnicity or national origin.”).

Ferenčák argues that he has a fundamental right to travel, citing *Macias v. Department of Labor & Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983). App. Br. at 38-39. But he fails to explain how the Department or the Board impinged on his fundamental right to travel.

*Macias* involved statutory exclusion of seasonal farm workers from benefits unless they earn at least \$150 in a calendar year from the employer in whose employ they suffered injury. *Macias*, 100 Wn.2d at 264-265. Noting that the workers “must move farm to farm and *state to state* in order to obtain continual employment,” *Macias*, 100 Wn.2d at 271 (emphasis added), the *Macias* court concluded that the \$150 requirement effectively “penalized” them for engaging in farm work (involving interstate travel), when their basic necessities of life depended on their small income from each farm, *id.* at 273. Ferencák fails to explain how the Department or the Board “penalized” him for exercising his fundamental right to travel, which is “the right to travel *within* the United States.” *Haig v. Agee*, 453 U.S. 280, 306, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981) (emphasis added) (noting a “crucial difference between the *freedom* to travel internationally and the *right* of interstate travel”).

Under the rational basis test, “there is a presumption of constitutionality,” and the classification is upheld “unless it rests on grounds *wholly irrelevant* to achievement of legitimate state objectives.” *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000) (emphasis added). A classification “will be upheld if *any conceivable state of facts* reasonably justifies the classification.” *Tunstall*, 141 Wn.2d at 226 (emphasis added). “In the ordinary case, a law will be

sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Ferenčák, who challenges the classification, “has the burden of proving that the classification is ‘purely arbitrary.’” *Tunstall*, 141 Wn.2d at 226.

Although there is no Washington case directly on point, the courts in other jurisdictions that have addressed a limited-English-speaker’s equal protection challenge to English notices or services have consistently upheld the constitutionality of such notices and services. *See Carmona*, 475 F.2d at 739 (“[T]he choice of California to deal only in English [in providing notices and services of unemployment benefits] has a reasonable basis.”); *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1026-29 (9th Cir. 1978) (no right to bilingual education); *Frontera v. Sindell*, 522 F.2d 1215, 1218-20 (6th Cir. 1975) (English-only civil service examination met the rational basis test); *Soberal-Perez*, 717 F.2d at 42-43 (“[I]t is not irrational for the Secretary [of HHS] to choose English as the one language in which to conduct her official affairs.”); *Olivo*, 337 N.E.2d at 911 (English-only notice of condemnation rationally based); *Guerrero*, 512 P.2d at 837-839 (English-only notice of reduction or termination of welfare benefits met the rational basis test).

The choice of the Department to deal primarily in English has a reasonable basis. It is “not difficult for us to understand why [an agency decides] that forms should be printed and oral instructions given in the English language: English is the national language of the United States.” *Soberal-Perez*, 717 F.2d at 42; *Frontera*, 522 F.2d at 1220 (“Our laws are printed in English and our legislatures conduct their business in English.”); *Olivo*, 337 N.E.2d at 911 (“English is the language of this country.”). The “additional burdens on [the state’s] finite resources and [its] interest in having to deal with one language with all its citizens support the conclusion of reasonableness.” *Carmona*, 475 F.2d at 739. Equal protection does not “dictate budget priorities by elevating language services over all other competing needs.” *Moua*, 324 F. Supp. 2d at 1138.

Ferenóak points out that the Department provides Spanish-speaking claimants with some services in Spanish. App. Br. at 36 n.41. The provision of such services does not violate equal protection, which “does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State’s action be rationally based and free from invidious discrimination.” *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) (citation omitted). “A classification does not fail rational-basis review because ‘it is not made with mathematical nicety or because in

practice it results in some inequity.” *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (quoting *Dandridge*). The Department’s providing services in Spanish in light of the many Spanish-speaking claimants is rational and does not demonstrate any invidious discrimination against other-language-speaking claimants.

Further, Ferencák fails to demonstrate that the Board treated him any differently from other English-speaking claimants – the Board does not pay for English-speaking claimants’ confidential communications with their attorneys. *See Jara*, 578 P.2d at 96-97 (court’s refusal to appoint an interpreter for a non-English-speaking, indigent, represented party in a civil case beyond the testimony did not violate equal protection).

#### **L. Ferencák Has No Right to Counsel**

Citing to WAC 263-12-020, Ferencák claims that the Department and the Board violated his “right to confer with counsel to prepare for and during hearings.” App. Br. at 40. He does not have such a right.

The rule allows a party to appear *pro se* or “by an attorney at law or other authorized lay representative of the party’s choosing”. WAC 263-12-020(1)(a). It does not purport to create any right to counsel. There is “no constitutional right to counsel afforded indigents involved in worker compensation appeals.” *In re Grove*, 127 Wn.2d at 238.

**M. The IAJ Properly Conducted the Hearings, and Ferenčák  
Fails to Show Any Reversible Error in the Hearing Process**

Ferenčák challenges various acts and omissions of the IAJ during the Board proceedings. App. Br. at 40-44. He complains that the IAJ (1) required him to provide testimony of the healthcare insurer by perpetuation deposition rather than at hearing (App. Br. at 41, 43), (2) admitted perpetuated testimony of his economist “at which free interpreter services were not provided” (App. Br. at 41), (3) failed “to require subpoenaed witnesses to appear and produce necessary documentation” (App. Br. at 43), and (4) failed “to elicit additional needed testimony to establish the nature and value of components of [his] wages” (App. Br. at 43-44). He fails to show any abuse of discretion in the hearing process.

To regulate the course of the hearing, the IAJ has broad authority, including that to issue subpoenas, rule on objections, motions, and evidence, schedule the presentation of evidence, “close the record on the completion of the taking of all evidence and the filing of pleadings and perpetuation depositions,” “consider appropriate sanctions, including closing the record and issuing a proposed decision and order,” when a party fails to confirm witnesses or present its evidence “within the timelines prescribed by the judge,” and to take “any other action necessary and authorized by these rules and the law.” WAC 263-12-045(2); *see also*

*Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 178, 947 P.2d 1275 (1997) (“Trial courts have broad discretionary powers in conducting a trial and dealing with irregularities that arise.”); RCW 51.52.140 (civil practice applies to workers’ compensation appeal unless otherwise provided). An abuse of discretion occurs when a decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Mayer v. STO Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citation omitted).

As to his first claimed error, Ferencák does not provide any reference to the record (and there is nothing in the record) to support his assertion that the IAJ *required* a perpetuation deposition of the healthcare provider. In fact, the record indicates that the IAJ scheduled a *hearing* time for Ferencák to present the testimony of the healthcare provider, TR (8/13/04) 25, but Ferencák did not call the healthcare provider to testify either at the hearing or at any perpetuation deposition (likely because a healthcare provider could offer no relevant evidence in a wage computation case). This Court should reject his unsupported assertion. *See* RAP 10.3(6); *In re Lint*, 135 Wn.2d at 532. Also, Ferencák did not make this assertion at the Board in his petition for review of the IAJ’s proposed decision, CABR 15-65, and has thus waived it, *see Sepich*, 75 Wn.2d at 316; RCW 51.52.104. Further, as shown above, the Board is not required to provide an interpreter at a perpetuation deposition.

As to his second claim of error, Ferenčák provides no reference to the record (and there is nothing in the record) to show the IAJ *required* the testimony of his economist be taken at a perpetuation deposition. In fact, in her “tentative” witness confirmation, Ferenčák’s attorney stated that his economist (Robert Moss) had already testified in a deposition but may testify again at a hearing, without complaining about the lack of an interpreter. CABR 283-284. In any event, Ferenčák did not attend the deposition, which was conducted by his attorney for a group of claimants for the economist to give *general* opinions on employment and benefits, non-specific to Ferenčák, and *Ferenčák* offered the perpetuated testimony to the Board. Moss (4/18/03) 4-70; Owen (12/5/03) 25 (“I will rely on the testimony already elicited from the Robert Moss, which was perpetuat[ed] and already provide[d] to the Board.”). Further, as shown above, the Board was not required to provide an interpreter at the deposition.

As to his third and forth claims of error, Ferenčák argued at the Board in his petition for review (CABR 15-65) *only* that the IAJ failed to enforce the subpoena duces tecum served on Corwin and McCadam “to demonstrate his regular overtime pay and rate of pay and to provide documentation of the percentage of the year end bonuses/profit sharing payments which [he] did not receive because of his industrial injury.” CABR 23. But Ferenčák does not assign error to, or make any arguments

challenging, the Superior Court findings or conclusions on his overtime pay and ordinary rate of pay. And, as stated above, the future bonus he anticipated but *did not receive* is irrelevant to the wage computation. Thus, he fails to show any prejudice from the claimed errors.

Also, after learning of Corwin's retirement, Ferencák requested that a subpoena be re-issued to *McCadam, instead of Corwin*, TR (9/3/04) 3, and the IAJ granted this request, CABR 588-589. Ferencák's attorney stated, "Mr. McCadam so his evidence can be received to complete the hearing in this case." Owen (9/20/04) 4. Ferencák cannot now complain that the IAJ should have enforced the subpoena issued to *Corwin*.

Further, during McCadam's testimony, Ferencák made no objection that McCadam did not bring all documents. McCadam testified that he brought subpoenaed documents, McCadam (11/10/04) 7, although he testified he did not bring documents as to whether Ferencák had signed up for the 401K plan, McCadam (11/10/04) 8, or about the rate Travis paid for industrial or unemployment insurance, McCadam (11/10/04) 28. As the IAJ pointed out, "at no time [during McCadam's testimony] did [Ferencák] make that an issue." IAJ (11/10/04) 59.

At the close of McCadam's testimony, when asked whether Ferencák had any further questions, Ferencák's attorney said, "Not from this side," and made no objection or a continuance request when the IAJ

excused McCadam as a witness. Owen (11/10/04) 52. Otherwise, the IAJ “would not have released him” and could have continued the hearing. IAJ (11/10/04) 57. It was *after* McCadam was released and Ferenčák gave further testimony that Ferenčák’s attorney stated she would like to obtain more information from McCadam. Owen (11/10/04) 55-56. Ferenčák’s attorney then rejected the IAJ’s suggestion to work with the Department to reach a stipulation on the information he sought from McCadam, rejected another suggestion to obtain the information through a perpetuation deposition, saying it would impose “a cost of hiring a court reporter,” and rejected a further suggestion of a telephone conference, insisting then that the Board pay the cost of McCadam’s deposition, claiming McCadam failed to respond fully to his subpoena. Owen (11/10/04) 56-59.

Under these circumstances, it cannot be said that the IAJ’s decision not to re-schedule another hearing or order McCadam to bring further evidence is manifestly unreasonable or based on untenable grounds.

#### **N. There Was No Cost Shifting**

Ferenčák claims that the Department and the Board *shifted* interpreter costs to him and argues that he is entitled to a reimbursement of the interpreter costs he allegedly incurred. App. Br. at 42-43.

But there was no cost *shifting*, because, as shown above, neither the Department nor the Board was required to provide further language

services than was provided to Ferenčák. Other expenses he allegedly incurred are his own or overhead costs of his attorney. Also, costs (and attorney fees) cannot be awarded in a workers' compensation appeal except at the court level to a party prevailing on the merits, only for attorney fees incurred at court, not all costs incurred at the Board proceedings, and no costs incurred at the Department level. RCW 51.52.130 (fourth sentence); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889, 86 P.3d 1231 (2002) ("The statute contains 'no provision for the recovery of attorney's fees from or payable by the department for services rendered before the board.'"), *review denied*, 152 Wn.2d 1032 (2005). Because Ferenčák did not prevail on the merits at the Superior Court, he is not entitled to a cost award.

Ferenčák's reliance on *Kenworthy v. Pennsylvania Gen. Ins. Co.*, 113 Wn.2d 309, 779 P.2d 257 (1989), is misplaced. *Kenworthy* involved the interpretation of the uninsured motorist (UIM) statute and is inapposite here. In any event, the court held that a clause in a UIM policy requiring an insured to pay the arbitration cost was void under the UIM statute but carefully stated "that costs such as fees for expert witnesses hired by a party and claimant's attorney fees . . . are distinguishable because they are normally associated with recovery in civil litigation between an injured party and an insured motorist, and would be assumed voluntarily."

*Kenworthy*, 113 Wn.2d at 315. Ferencák and his attorney *voluntarily* incurred the alleged interpreter expenses associated with his claim.

**O. The Superior Court Properly Granted the Department the Cost of \$200 Attorney Fees Pursuant to Chapter 4.84 RCW**

Ferencák challenges the Superior Court cost award of statutory attorney fees to the Department as a prevailing party. App. Br. at 45-49.

But our Supreme Court has already rejected this challenge and approved the cost award to the Department under RCW 51.52.140 and Chapter 4.84 RCW. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557-558, 933 P.2d 1025 (1997); RCW 51.52.140 (except as otherwise provided, "the practice in civil cases shall apply"); RCW 4.84.030 (in any superior court action, "the prevailing party shall be entitled to his or her costs and disbursements . . ."); RCW 4.84.080(1) ("costs to be called the attorney fee" when allowed in all actions where judgment is rendered are \$200); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 423, 832 P.2d 489 (1992) ("The Department as prevailing party is entitled to its statutory costs including statutory attorney fees.").

Although Ferencák claims that *Black* was wrong, "once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976). Our Supreme Court's reading of

RCW 51.52.140 in *Black* to allow costs under RCW 4.84 has not been overruled or superseded by any legislative action and must thus stand.

**P. Any Attorney Fee Award Must Be Contingent on the Accident Fund Being Affected by the Decision**

A reasonable attorney fee award to a prevailing worker "payable out of the [Department's] administrative fund" derives from the fourth sentence of RCW 51.52.130. *Piper*, 120 Wn. App. at 889-891. Thus, if Ferenčák prevails in this case, any award to him would have to be made contingent on whether "the accident fund or medical aid fund [were] affected" by the court decision. RCW 51.52.130.

**VII. CONCLUSION**

For the reasons stated above, the Department requests that this Court affirm the Superior Court judgment below.

SUBMITTED this 10th day of August, 2007.

ROBERT M. MCKENNA  
Attorney General



Masako Kanazawa, WSBA #32703  
Assistant Attorney General  
John R. Wasberg, WSBA #6409  
Senior Counsel  
800 5th Avenue  
Seattle, WA 98104-3188  
(206) 389-2126

# APPENDIX A

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WORKING PAPERS:  
JUDGE MICHAEL HAYDEN  
HEARING: 12-28-06 8:30 A.M.

STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT

IVAN FERENCAK,

Plaintiff,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Defendant,

BOARD OF INDUSTRIAL  
INSURANCE APPEALS,

Intervenor.

CAUSE NO. 05-2-37144-7SEA

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	Ivan Ferencak
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Statutory Attorney Fees:	\$200.00
6. Costs:	\$0
7. Other Recovery Amounts:	\$0

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW  
AND JUDGMENT

1

ATTORNEY GENERAL OF WASHINGTON  
LABOR & INDUSTRIES DIVISION

800 Fifth Avenue, Suite 2000

Seattle, WA 98104-3188

(206) 464-7740

1  
2 8. Principal Judgment Amount shall bear interest at 0% per annum.

3 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

4 10. Attorneys for Judgment Creditor: Maureen Mannix, John Wasberg  
5 Office of the Attorney General  
6 800 Fifth Avenue  
7 Seattle, WA 98104-3188

8 11. Attorney for Judgment Debtor: Ann Pearl Owen  
9 Attorney at Law  
10 2407 14<sup>th</sup> Avenue South  
11 Seattle, WA 98144

12 12. Attorney for Intervenor: Johnna Skyles Craig  
13 Office of the Attorney General  
14 P.O. Box 40108  
15 Seattle, WA 98504-0108

16 This matter came on regularly before the Honorable Michael Hayden, in open court on  
17 August 7, 2006. The Plaintiff, Ivan Ferencak, was represented by counsel, Ann Pearl Owen;  
18 the Defendant, Department of Labor and Industries (Department), appeared by its counsel, Rob  
19 McKenna, Attorney General, per Maureen Mannix, Assistant Attorney General; Intervenor, the  
20 Board of Industrial Insurance Appeals, appeared by its counsel, Rob McKenna, Attorney  
21 General, per Johnna Skyles Craig, Assistant Attorney General. The Court reviewed the  
22 records and files herein, including the Certified Appeal Board Record, and briefs submitted by  
23 counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the  
24 following:

## 25 I. FINDINGS OF FACT

26 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) and testimony  
of other witnesses was perpetuated by deposition.

The Industrial Appeals Judge issued an initial Proposed Decision affirming the  
Department in the consolidated appeals by order dated April 15, 2005 from which  
Plaintiff filed a timely Petition for Review. The Board granted review, and affirmed  
the Proposed Decision and Order by issuing a separate order dated October 18, 2005.

1 Plaintiff thereupon timely appealed the Board's order to this Court.

2 1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 1 through 9.  
3 The Court adopts as its Findings of Fact, and incorporates by this reference, the Board's  
4 Findings of Facts Nos. 1 through 9 of the October 18, 2005 Decision and Order.

5 Based upon the foregoing Findings of Fact, the Court now makes the following

6 **II. CONCLUSIONS OF LAW**

7 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

8 2.2 The Board's Conclusions of Law Nos. 1 through 4 are correct. The Court adopts as its  
9 Conclusions of Law, and incorporates by this reference, the Board's Conclusions of  
Law Nos. 1 through 4 of the October 18, 2005 Decision and Order.

10 2.3 The Board's Decision and Order of October 18, 2005 is correct and is affirmed.

11 2.4 The Board did not violate the constitutional due process or other constitutional rights of  
12 Mr. Ferencak in providing interpreter services or otherwise.

13 Based on the foregoing Findings of Fact and Conclusions of Law the Court enters  
14 judgment as follows:

15 **III. JUDGMENT**

16 3.1 The October 18, 2005 Board of Industrial Insurance Appeals Decision and Order,  
17 should be and is hereby affirmed.

18 3.2 The Defendant is awarded, and the Plaintiff is ordered to pay, a statutory attorney fee of  
19 \$200.00.

20 3.3 The Department is awarded interest from the date of entry of this judgment as provided  
21 by RCW 4.56.110.

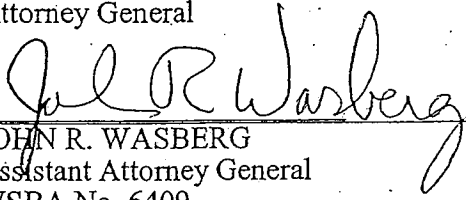
22 DATED this 19 day of December, 2006.

23 **MICHAEL HAYDEN**

24 MICHAEL HAYDEN, J U D G E

25 Presented by:  
26 ROB MCKENNA

1 Attorney General

2 

3 JOHN R. WASBERG

4 Assistant Attorney General

5 WSBA No. 6409

6 Attorney for Department of Labor and  
Industries (substituting for AAG Maureen  
Mannix)

7 Copy received,  
8 approved as to form and  
notice of presentation waived:

9  
10 ANN PEARL OWEN

11 WSBA No. 9033

12 Attorney for Claimant

13 JOHNNA SKYLES CRAIG

14 Assistant Attorney General

15 WSBA No. 35559

16 Attorney for Intervenor Board  
Of Industrial Insurance Appeals

17  
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FINDINGS OF FACT AND CONCLUSIONS  
OF LAW  
AND JUDGMENT

## **APPENDIX B**

## STATE OF WASHINGTON

CLAIM NO. Y-388825

### DECISION AND ORDER

The remaining appeals, consolidated with Docket No. 02 21795, are Mr. Ferencak's appeals from orders paying and/or adjusting time loss compensation for particular periods. The amount of payments and adjustments are premised on the determinations made in the Department order appealed in Docket No. 02 21795. The appeals were docketed by the Board as follows: **Docket No. 02 22295**, an appeal filed on November 25, 2002, from a November 18, 2002 Department order; **Docket No. 02 22296**, an appeal filed on November 25, 2002, from a November 19, 2002 Department order; **Docket No. 02 22794**, an appeal filed on December 6, 2002, from a December 2, 2002 Department order, wherein the Department also terminated time loss

1 compensation effective November 25, 2002; **Docket No. 02 23491**, an appeal filed on  
2 November 15, 2002, from a May 2, 2002 Department order; **Docket No. 02 23492**, an appeal filed  
3 on November 15, 2002, from a May 14, 2002 Department order; **Docket No. 02 23698**, an appeal  
4 filed on November 15, 2002, from a May 28, 2002 Department order; **Docket No. 03 15795**, an  
5 appeal filed on May 23, 2003, from a May 20, 2003 Department order; **Docket No. 03 16196**, an  
6 appeal filed on June 4, 2003, from a June 2, 2003 Department order; **Docket No. 03 16790**, an  
7 appeal filed on June 18, 2003, from a June 16, 2003 Department order; **Docket No. 03 17975**, an  
8 appeal filed on July 30, 2003, from a July 28, 2003 Department order; **Docket No. 03 18398**, an  
9 appeal filed on July 3, 2003, from a June 30, 2003 Department order; **Docket No. 03 19097**, an  
10 appeal filed on July 18, 2003, from a July 14, 2003 Department order; and **Docket No. 03 20291**,  
11 an appeal filed on August 13, 2003, from an August 11, 2003 Department order. Each of these  
12 appealed Department orders are **AFFIRMED**.

### 13 PROCEDURAL AND EVIDENTIARY MATTERS

14 The industrial appeals judge affirmed the appealed Department orders in a Proposed  
15 Decision and Order issued on April 15, 2005. Mr. Ferencak filed a timely Petition for Review. This  
16 matter is therefore before the Board for review and decision pursuant to RCW 51.52.104 and  
17 RCW 51.52.106.

18 The critical appeal is the appeal assigned Docket No. 02 21795. In this appeal,  
19 Mr. Ferencak challenges the underlying Department order wherein the Department determined the  
20 basis for setting Mr. Ferencak's time loss compensation rate. This appeal adequately preserved  
21 Mr. Ferencak's right to have his time loss compensation payments appropriately adjusted were he  
22 to prevail and show that the Department had incorrectly determined his monthly wages at the time  
23 of injury. The Department and Mr. Ferencak stipulated that Mr. Ferencak did not read and  
24 understand English sufficiently to understand the import of the Department order dated May 6,  
25 2002. They further stipulated that Mr. Ferencak's attorney filed the appeal from this order within  
26 sixty days of the date on which an interpreter communicated the order to him in terms that he could  
27 understand. We agree that the appeal is timely. The other appeals are timely for like reason, or  
28 because they were filed by mail within sixty days of receipt of the respective Department orders.

29 Mr. Ferencak is represented by an attorney. The Board provided interpreter services to  
30 Mr. Ferencak, to the party representatives, and to the industrial appeals judge during  
31 Mr. Ferencak's testimony. Mr. Ferencak contends that interpreter services should have been  
32 additionally provided him at the Department level, during communications with his attorney, and

1 during other proceedings at the Board. We find there was no unfair prejudice to Mr. Ferencak due  
2 to the Board not providing additional interpreter services. The matter of whether, and to what  
3 extent, the Department should have provided interpreter services is not properly before this Board.  
4 No written order of the Department denying such a request, if any was made, is before the Board in  
5 these appeals. Further, we have reviewed Mr. Ferencak's contentions in light of prior Board  
6 decisions and uphold our industrial appeals judge's determinations. See *In re Hajrudin S. Kustura*,  
7 Dckt. No. 01 18920 (June 18, 2003), with which Mr. Ferencak's counsel is familiar.

8 The Board has reviewed the remaining evidentiary and procedural rulings in the record of  
9 proceedings and finds that no prejudicial error was committed. The rulings, including those within  
10 the Proposed Decision and Order, are affirmed.

### 11 DECISION

12 Ivan Ferencak sustained an industrial injury to his right knee on March 20, 2002, while  
13 working for Travis Industries, Inc. He had worked for Travis Industries, Inc., since June 11, 2001.  
14 He has had three surgeries on his knee. Mr. Ferencak has received time loss compensation for  
15 periods he has been off work since the date of injury because of the knee conditions, including  
16 periods of recovery from the surgeries. The Department of Labor and Industries established  
17 Mr. Ferencak's time loss compensation rate based on its determination of monthly wages at the  
18 time of injury and his married status and two dependent children. Determinations of monthly wages  
19 at the time of injury are governed by RCW 51.08.178. The monthly time loss rate is a percentage  
20 of the monthly wages with the particular percentage governed by RCW 51.32.060 and  
21 RCW 51.32.090, based on marital status and an injured worker's number of dependents.

22 Mr. Ferencak contends that the Department understated his wages at the time of injury  
23 under RCW 51.08.178. The Department included in Mr. Ferencak's wage determination earnings  
24 of \$11.50 per hour, eight hours per day, five days per week, or \$2,024 per month plus additional  
25 includable wage equivalents for employer-provided health care benefits of \$175 per month, for a  
26 total of \$2,199 monthly wages at the time of injury. The Department explicitly indicated it did not  
27 include any tips, bonuses, overtime, housing, board, or fuel.

28 Mr. Ferencak contends that the Department should have used a base hourly wage rate of  
29 \$11.75 per hour and should have included overtime pay at a rate of \$17.75 per hour. Mr. Ferencak  
30 contends the Department should increase his monthly wage determination to account for  
31 anticipated, further hourly wage increases. He further contends that amounts should have been  
32 added to "wages" for vacation pay, an anticipated bonus (profit sharing), employer contributions to

1 a 401K retirement plan, taxes paid for federal social security (retirement and disability) and for  
2 Medicare, employer-paid premiums or taxes for unemployment compensation, and employer-paid  
3 industrial insurance premiums or taxes.

4 We agree with our industrial appeals judge's determination that Mr. Ferencak has not met  
5 his burden to show that an additional amount for overtime pay should be included in his monthly  
6 wage determination. RCW 51.08.178(1) governs wage inclusions for regular workers such as  
7 Mr. Ferencak, as distinct from workers who are exclusively seasonal or essentially part-time or  
8 intermittent. Subsection (2) of the statute governs monthly wage determinations for workers who  
9 are exclusively seasonal or essentially part-time or intermittent. Subsection (1) allows for inclusion  
10 of hours normally worked regardless of whether these hours are referred to by the employer or  
11 worker as "overtime" hours. Subsection (1) does not otherwise allow for overtime pay, that is, any  
12 additional amount of pay per hour, to be included in the wage determination for regular workers.  
13 Overtime pay is included in the averaging method directed by subsection (2) for workers who are  
14 exclusively seasonal or essentially part-time or intermittent. Mr. Ferencak has not shown that he  
15 normally worked more hours than taken into account by the Department. Roy Corwin, Travis  
16 Industries' former Human Resources Manager, specifically indicated that Mr. Ferencak did not work  
17 regular overtime hours. 12/5/03 Tr. at 21. Mr. Ferencak has not contended that he was a  
18 subsection (2), exclusively seasonal or essentially part-time or intermittent worker. Therefore,  
19 neither overtime hours nor overtime pay should be included in his wage determination.

20 We are not aware of any authority that would justify including additional amounts in "wages"  
21 to account for anticipated increases in hourly wage rate. Clearly, RCW 51.08.178 refers to the  
22 monthly wages the worker was receiving from all employment "at the time of injury . . ." No  
23 consideration for anticipated wage increases beyond the date of injury is authorized by the statute.  
24 The Department and the industrial appeals judge correctly excluded from Mr. Ferencak's wage  
25 determination any consideration of such anticipated, but not actual, hourly wage increases.

26 Mr. Corwin did testify that Mr. Ferencak would have been qualified for the company's bonus  
27 or profit sharing plan in which payments were made as salary or wages to workers, but  
28 Mr. Ferencak was not working at the time of the year-end bonus. See 12/5/03 Tr. at 32-33. Jerry  
29 McCadam, Travis Industries' present Human Resources Manager, testified that Mr. Ferencak, by  
30 the time of injury, had worked 440 hours, just short of the 500 hours necessary to qualify in the year  
31 2002 for the year-end bonus. He further testified that Mr. Ferencak, by returning to work later in the  
32 year, completed over 600 hours and did receive a bonus (profit sharing) distribution for 2002, which

1 was 2.32 percent of his gross wages for 2002. See 11/10/04 Tr. at 17-19. It may then initially  
2 appear logical to multiply this percentage times Mr. Ferencak's gross monthly wage at the time of  
3 injury and add this amount to the wage determination at the time of injury. Nevertheless, the  
4 Legislature adopted a different approach:

5       If, within the twelve months immediately preceding the injury, the worker  
6       has received from the employer at the time of injury a bonus as part of  
7       the contract of hire, the average monthly value of such bonus shall be  
8       included in determining the worker's monthly wages.

8 RCW 51.08.178(3). Mr. Ferencak did not present testimony concerning whether he had received a  
9 bonus in the twelve months preceding the industrial injury of March 20, 2002. In light of the  
10 Legislature's given approach to bonuses, we feel constrained to deny Mr. Ferencak's request that  
11 we include any amount for a bonus in his wage determination.

12       We turn now to Mr. Ferencak's request that we include, in his monthly wage determination,  
13 potential employer contributions or payments to a 401K retirement plan, employer contributions or  
14 taxes paid for federal social security (disability and retirement benefits) and for Medicare,  
15 employer-paid premiums or taxes for unemployment compensation paid to Employment Security,  
16 and employer-paid industrial insurance premiums or taxes.

17       Travis Industries offered eligible employees a 401K matching contribution program.  
18 Eligibility required a full year of employment. The program was then available at the option of the  
19 eligible employee. At the time of injury, Mr. Ferencak did complete one year of employment. No  
20 contributions had been made by Travis Industries to a 401K plan for Mr. Ferencak as of the date of  
21 Mr. Ferencak's injury. We do not know of any authority to include in wage determinations amounts  
22 of benefits which the worker had not earned as of the time of the injury. Again, RCW 51.08.178  
23 aims at determining earning capacity as demonstrated by wages at the time of injury. The statute  
24 does not focus our attention on any attempt to estimate or determine lost **future** earnings  
25 opportunities no matter how predictable and calculable those opportunities or future capacities  
26 might be. We reject Mr. Ferencak's contention that a value should be assigned to this potential  
27 future benefit and added to his monthly wage determination.

28       Our State Supreme Court adopted a view that the key phrase in RCW 51.08.178(1), "board,  
29 housing, fuel, or other consideration of like nature" means "readily identifiable and reasonably  
30 calculable in-kind components of a worker's lost earning capacity at the time of injury that are  
31 critical to protecting workers' basic health and survival." *Cockle v. Department of Labor & Indus.*,  
32 142 Wn.2d 801, 822 (2001). Applying the reasoning in *Cockle*, this Board has previously rejected

1 contentions that pension contributions should be included in wages under RCW 51.08.178. See  
2 *In re Fred L. Jones*, BIIA Dec., 02 11439 (2003) and *In re Ronald Tucker*, BIIA Dec., 00 11573  
3 (2001). We held these contributions are not of "like nature" with benefits such as food, shelter, fuel,  
4 and health care. Neither are such contributions non-fringe benefits critical to protecting the  
5 worker's basic health and survival. We used similar reasoning in denying inclusion of  
6 employer-provided life insurance contributions in wage determinations under RCW 51.08.178. See  
7 *In re Douglas Jackson*, BIIA Dec., 99 21831 (2001).

8 Workers have challenged application of the *Cockle* analysis to these other benefits or  
9 payments. Our State Supreme Court recently reaffirmed that its reasoning when it considers  
10 employer-provided health care in *Cockle*, is to be utilized also in determining whether the  
11 Department should include other benefits and payments similarly contended to constitute wages  
12 under RCW 51.08.178(1): employer contributions to union retirement trust funds, apprenticeship  
13 training trust payments, LECET account (for management-labor promotion), training, sick pay, life  
14 insurance, disability insurance, and union trust death and dismemberment protection. *Gallo v.*  
15 *Department of Labor & Indus.*, 75928-6 (September 29, 2005). We note that, in this case, the  
16 Supreme Court affirmed our determination in *Jones, supra*.

17 The *Gallo* court held that the contributions to union trust funds were not cash wages because  
18 they were not paid to, or controlled by, the individual worker. The *Gallo* court then clearly focused  
19 its interest on whether the benefits were critical to the basic health and survival of the worker "at the  
20 time of injury." *Gallo*, at 11. Retirement funds contributions, life insurance fund contributions,  
21 disability insurance fund contributions, apprentice trust fund payments, and LECET payments  
22 should not be included in wages because these are not cash payments to the worker and they are  
23 not critical to the worker's basic health and survival at the time of injury. *Gallo*, at 12.

24 We also find no merit in the idea that some additional amount should be included in "wages"  
25 to reflect the accrual of paid vacation or sick days. Mr. Ferencak has not produced any evidence to  
26 suggest that such a benefit increased his monthly income. He assumedly would receive the same  
27 pay whether or not he took advantage of a paid vacation day. A paid vacation day or sick day is of  
28 no different value to an hourly wage earner than is the value of a weekend or holiday or other day  
29 off with pay to a monthly or yearly salaried worker. The day off is not a cash equivalent paid to the  
30 worker. It is not disposable for cash and it does not replace some expenditure the worker would  
31 have to make for basic survival and health at the time of injury.

1 For similar reasons we reject Mr. Ferencak's contentions that the Department should have  
2 included in his wage determination employer contributions or taxes paid for federal social security  
3 (disability and retirement benefits) and for Medicare, employer-paid premiums or taxes for  
4 unemployment compensation paid to Employment Security, and employer-paid industrial insurance  
5 premiums or taxes. These are not, under the *Gallo* and *Cockle* analyses, a wage equivalent paid to  
6 the worker, nor are they benefits critical to the worker's basic health and survival at the time of  
7 injury. Rather, the payments are payments required by law to governmental entities. If otherwise  
8 qualified, Mr. Ferencak would receive benefits due from such entities without regard to whether  
9 Travis Industries had met its legal obligations to pay such taxes or premiums. Mr. Ferencak  
10 exercises no control over these monies paid to governmental entities.

11 We have considered the Proposed Decision and Order and Mr. Ferencak's Petition for  
12 Review. Based on a thorough review of the entire record before us, we enter the following:

#### 13 FINDINGS OF FACT

- 14 1. On March 26, 2002, the Department received an application for benefits  
15 from the claimant, Ivan Ferencak, in which he alleged he sustained a  
16 right leg injury on March 20, 2002, in the course of his employment with  
17 Travis Industries, Inc. On April 15, 2002, the Department allowed the  
claim for right leg injury as Claim No. Y-388825.

18 **Docket No. 02 23491:** Mr. Ferencak filed an appeal on November 15,  
19 2002, from a Department order dated May 2, 2002, wherein the  
20 Department paid time loss compensation benefits from April 12, 2002  
21 through April 26, 2002, and set the time loss rate for the payment period  
at \$1,396.50 per month.

22 On January 3, 2003, the Board granted the appeal, subject to proof of  
23 timeliness, assigned Docket No. 02 23491, and directed that further  
24 proceedings be held. The parties stipulated that the appeal was filed  
25 within sixty days after an interpreter communicated to Mr. Ferencak the  
26 significance of the Department order, and that without such  
interpretation Mr. Ferencak was unable to comprehend the order.

27 **Docket No. 02 21795:** Mr. Ferencak filed an appeal on November 15,  
28 2002, from a Department order dated May 6, 2002, wherein the  
29 Department described the wage rate calculation method: wage for the  
30 job of injury was based on \$11.50 per hour, eight hours per day, five  
31 days per week, which equals \$2,024 per month; additional wage for the  
32 job of injury include: health care benefits of \$175 per month; tips, none;  
bonuses, none; overtime, none; housing/board/fuel, none; worker's total  
gross wage is \$2,199 per month; marital status eligibility on the date of  
this order is married with two children.

1 On December 12, 2002, the Board extended the time to act on the  
2 appeal for an additional ten days. On December 24, 2002, the Board  
3 extended the time to act on the appeal for an additional ten days. On  
4 January 3, 2003, the Board granted the appeal, subject to proof of  
5 timeliness, assigned Docket No. 02 21795, and directed that further  
6 proceedings be held. The parties stipulated that the appeal was filed  
7 within sixty days after an interpreter communicated to Mr. Ferencak the  
8 significance of the Department order, and that without such  
9 interpretation Mr. Ferencak was unable to comprehend the order.

10 **Docket No. 02 23492:** Mr. Ferencak filed an appeal on November 15,  
11 2002, from a Department order dated May 14, 2002, wherein the  
12 Department paid time loss compensation benefits from April 27, 2002  
13 through May 10, 2002, and set the time loss compensation rate for the  
14 period at \$1,396.50 per month.

15 On January 3, 2003, the Board granted the appeal, subject to proof of  
16 timeliness, assigned Docket No. 02 23492, and directed that further  
17 proceedings be held. The parties stipulated that the appeal was filed  
18 within sixty days after an interpreter communicated to Mr. Ferencak the  
19 significance of the Department order, and that without such  
20 interpretation Mr. Ferencak was unable to comprehend the order.

21 **Docket No. 02 23698:** Mr. Ferencak filed an appeal on November 15,  
22 2002, from a Department order dated May 28, 2002, wherein the  
23 Department paid time loss compensation benefits from May 11, 2002  
24 through May 24, 2002, and set the time loss compensation rate for the  
25 period at \$1,396.50 per month.

26 On January 3, 2003, the Board granted the appeal, subject to proof of  
27 timeliness, assigned Docket No. 02 23698, and directed that further  
28 proceedings be held. The parties stipulated that the appeal was filed  
29 within sixty days after an interpreter communicated to Mr. Ferencak the  
30 significance of the Department order, and that without such  
31 interpretation Mr. Ferencak was unable to comprehend the order.

32 **Docket No. 02 22295:** Mr. Ferencak filed an appeal on November 25,  
2002, from a Department order dated November 18, 2002, wherein the  
Department provided a partial payment of time loss compensation  
benefits to adjust for prior payments from May 25, 2002 through  
November 1, 2002, based on varying compensation rates. The order  
corrected and superseded orders dated June 20, 2002; July 2, 2002;  
July 16, 2002; July 30, 2002; August 13, 2002; August 27, 2002;  
September 10, 2002; September 24, 2002; October 8, 2002;  
October 22, 2002; and November 5, 2002.

1 On December 24, 2002, the Board extended the time to act on the  
2 appeal for an additional ten days. On January 3, 2003, the Board  
3 granted the appeal, assigned Docket No. 02 22295, and directed that  
4 further proceedings be held.

5 **Docket No. 02 22296:** Mr. Ferencak filed an appeal on November 25,  
6 2002, from a Department order dated November 19, 2002, wherein the  
7 Department paid time loss compensation benefits from November 2,  
8 2002 through November 15, 2002, and set the time loss compensation  
rate for the period at \$1,409.42 per month or \$46.98 per day.

9 On December 24, 2002, the Board extended the time to act on the  
10 appeal for an additional ten days. On January 3, 2003, the Board  
11 granted the appeal, assigned Docket No. 02 22296, and directed that  
further proceedings be held.

12 **Docket No. 02 22794:** Mr. Ferencak filed an appeal on December 6,  
13 2002, from a Department order dated December 2, 2002, wherein the  
14 Department paid time loss compensation benefits from November 16,  
15 2002 through November 24, 2002, and set the time loss compensation  
16 rate for the period at \$1,531.28 per month or \$51.04 per day. Time loss  
17 compensation benefits were ended as of November 25, 2002, because  
the worker was released to return to work.

18 On January 3, 2003, the Board granted the appeal, assigned Docket  
19 No. 02 22794, and directed that further proceedings be held.

20 **Docket No. 03 15795:** Mr. Ferencak filed an appeal on May 23, 2003,  
21 from a Department order dated May 20, 2003, wherein the Department  
22 paid time loss compensation benefits from April 21, 2003 through May 5,  
23 2003, and set the time loss compensation rate for the period at  
\$1,531.28 per month or \$51.04 per day.

24 On June 23, 2003, the Board granted the appeal, assigned Docket  
25 No. 03 15795, and directed that further proceedings be held.

26 **Docket No. 03 16196:** Mr. Ferencak filed an appeal on June 4, 2003,  
27 from a Department order dated June 2, 2003, wherein the Department  
28 paid time loss compensation benefits from May 6, 2003 through May 27,  
29 2003, and set the time loss compensation rate for the period at  
\$1,531.28 per month or \$51.04 per day.

30 On June 23, 2003, the Board granted the appeal, assigned Docket  
31 No. 03 16196, and directed that further proceedings be held.  
32

1  
2 **Docket No. 03 16790:** Mr. Ferencak filed an appeal on June 18, 2003,  
3 from a Department order dated June 16, 2003, wherein the Department  
4 paid time loss compensation benefits from May 28, 2003 through  
5 June 10, 2003.

6  
7 On July 19, 2003, the Board extended the time to act on the appeal for  
8 an additional ten days. On July 25, 2003, the Board granted the appeal,  
9 assigned Docket No. 03 16790, and directed that further proceedings be  
10 held.

11 **Docket No. 03 18398:** Mr. Ferencak filed an appeal on July 3, 2003,  
12 from a Department order dated June 30, 2003, wherein the Department  
13 paid time loss compensation benefits from June 11, 2003 through  
14 June 24, 2003, and set the time loss compensation rate for the period at  
15 \$1,531.28 per month or \$51.04 per day.

16 On August 1, 2003, the Board extended the time to act on the appeal for  
17 an additional ten days. On August 8, 2003, the Board granted the  
18 appeal, assigned Docket No. 03 18398, and directed that further  
19 proceedings be held.

20 **Docket No. 03 19097:** Mr. Ferencak filed an appeal on July 18, 2003,  
21 from a Department order dated July 14, 2003, wherein the Department  
22 paid time loss compensation benefits from June 25, 2003 through  
23 July 8, 2003, and set the time loss compensation rate for the period of  
24 June 25, 2003 through June 30, 2003, at \$1,531.28 per month or \$51.04  
25 per day. The time loss compensation rate for the period of July 1, 2003  
26 through July 8, 2003, was set at \$1,560.60 per month or \$52.02 per day.

27 On August 8, 2003, the Board granted the appeal, assigned Docket  
28 No. 03 19097, and directed that further proceedings be held.

29 **Docket No. 03 17975:** Mr. Ferencak filed an appeal on July 30, 2003,  
30 from a Department order dated July 28, 2003, wherein the Department  
31 paid time loss compensation benefits from July 9, 2003 through July 22,  
32 2003, and set the time loss compensation rate for the period at  
\$1,560.52 per month or \$52.02 per day.

On August 27, 2003, the Board granted the appeal, assigned Docket  
No. 03 17975, and directed that further proceedings be held.

**Docket No. 03 20291:** Mr. Ferencak filed an appeal on August 13,  
2003, from a Department order dated August 11, 2003, wherein the  
Department paid time loss compensation benefits from July 23, 2003  
through August 5, 2003, and set the time loss compensation rate for the  
period at \$1,560.52 per month or \$52.02 per day.

1 On August 27, 2003, the Board granted the appeal, assigned Docket  
2 No. 03 20291, and directed that further proceedings be held.

- 3 2. Ivan Ferencak is a Bosnian immigrant who does not understand or  
4 speak English. Mr. Ferencak became an employee of Travis Industries,  
5 Inc., on June 11, 2001. He was injured while acting in the course of  
6 employment with his company on March 20, 2002, when he lifted a  
7 heavy metal sheet, twisted, and something cracked or popped in his  
8 right knee.
- 9 3. On March 20, 2002, Travis Industries, Inc., employed Mr. Ferencak  
10 eight hours per day, five days per week, and paid him \$10.50 in regular  
11 hourly wages.
- 12 4. At time of injury Mr. Ferencak had not established a pattern normally  
13 working additional overtime hours.
- 14 5. Travis Industries, Inc., paid the sum of \$197.15 per month to a health  
15 care plan in order to ensure that Mr. Ferencak had insurance coverage  
16 for medical and dental care. This coverage began six months after  
17 Mr. Ferencak's initial date of hire, June 11, 2001.
- 18 6. Mr. Ferencak did not present evidence of any bonuses paid him by  
19 Travis Industries in the twelve months preceding the March 2002 injury.
- 20 7. As of March 20, 2002, Travis Industries, Inc., made payments on  
21 Mr. Ferencak's behalf to the Social Security Administration under the  
22 Federal Insurance Contributions Act, paid a federal tax toward the  
23 Medicare program on his behalf, and paid industrial insurance premiums  
24 and employment security taxes pursuant to state law.
- 25 8. The benefits enumerated in Finding of Fact No. 7 are not core,  
26 non fringe-benefits that were critical to protecting Mr. Ferencak's basic  
27 health and survival.
- 28 9. During all legal proceedings before the Board which required  
29 Mr. Ferencak's direct participation, a Bosnian/Serbo Croatian interpreter  
30 was provided to him at the Board's expense and at no cost to  
31 Mr. Ferencak.

#### 32 CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the  
parties to and the subject matter of these appeals.
2. Ivan Ferencak was not entitled to have the Board pay the cost of an  
interpreter for communications between himself and his attorney  
regarding the processing of his claim within the guidelines of

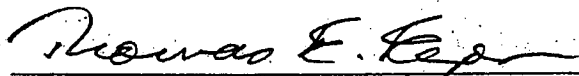
Department policy or as contemplated by WAC 263-12-090 and Ch. 2.43 RCW.

3. As of March 20, 2002, Mr. Ferencak's monthly wages, as that term is used in RCW 51.08.178(1), included his hourly wages and the employer-paid value of health care benefits to which he was entitled, but the wages did not include any employer-paid contributions to social security, Medicare, life and/or disability insurance policies, 401(K) or money purchase pension plans, or to ensure that Mr. Ferencak had industrial insurance and unemployment compensation coverage. RCW 51.08.178(1) does not contemplate the inclusion of future potential wages increases, vacation days, or sick days accrued. RCW 51.08.178(1) and (3) include consideration of bonuses paid only in the twelve months preceding the injury.
4. The Department orders dated May 2, 2002 (Docket No. 02 23491); May 6, 2002 (Docket No. 02 21795); May 14, 2002 (Docket No. 02 23492); May 28, 2002 (Docket No. 02 23698); November 18, 2002 (Docket No. 02 22295); November 19, 2002 (Docket No. 02 22296); December 2, 2002 (Docket No. 02 22794); May 20, 2003 (Docket No. 03 15795); June 2, 2003 (Docket No. 03 16196); June 16, 2003 (Docket No. 03 16790); June 30, 2003 (Docket No. 03 18398); July 14, 2003 (Docket No. 03 19097); July 28, 2003 (Docket No. 03 17975); and August 11, 2003 (Docket No. 03 20291), are correct and are affirmed.

It is so **ORDERED**.

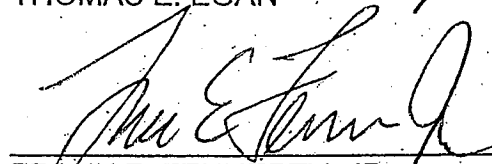
Dated this 18th day of October, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS



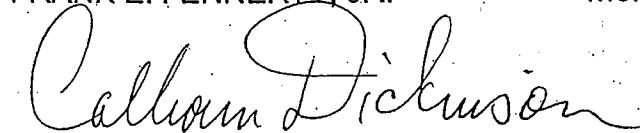
THOMAS E. EGAN

Chairperson



FRANK E. FENNERTY, JR.

Member



CALHOUN DICKINSON

Member

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SEATTLE

NO. 58878-8  
COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON

IVAN FERENCAK,

Appellant,

v.

DEPARTMENT OF LABOR &  
INDUSTRIES OF THE STATE  
OF WASHINGTON, AND THE  
BOARD OF INDUSTRIAL  
INSURANCE APPEALS,

Respondents.

CERTIFICATE OF  
SERVICE

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the 13<sup>th</sup> day of August, 2007, she caused to be served by ABC Legal Services a copy of the **Brief of Respondent Department of Labor and Industries** with attached copies of **Superior Court Judgment (Appendix A)**, and the **Board's Decision and Order (Appendix B)** to the attorneys for the Appellant, and the Board of Industrial Insurance Appeals, as follows:

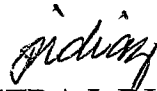
BY ABC LEGAL SERVICES:

ANN PEARL OWEN  
2407 14<sup>TH</sup> AVENUE SOUTH  
SEATTLE WA 98144-5014

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P.O. BOX 40108  
OLYMPIA WA 98504-0108

DATED AT Seattle, Washington, August 13, 2007.



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Labor and Industries Division  
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Seattle, WA 98104-3188